

NO. 22545

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee

v.

DONALD TORGESON, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT COURT
(FC-CR. NO. 99-0095)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Lim, JJ.)

On February 17, 1999, Defendant-Appellant Donald Torgeson (Donald) was charged with having committed two counts of Abuse of Family and Household Member, Hawai'i Revised Statutes (HRS) § 709-906 (Supp. 1999), on February 6, 1999. The victim alleged in Count I was Donald's wife, Jeri Torgeson (Jeri). The victim alleged in Count II was Donald's five-year-old stepdaughter (Stepdaughter).

On April 8, 1999, after a bench trial, Donald was found guilty of Count I, and not guilty of Count II, and sentenced to probation for one year upon the condition that he be incarcerated for twenty days with credit given for three hours previously served.

Donald appealed the April 8, 1999 Judgment of Probation. On June 18, 1999, the circuit court entered its Order

Granting Defendant's Motion to Stay Execution of Sentence pending resolution of Donald's appeal.

We affirm.

BACKGROUND

There is evidence that on February 6, 1999, Jeri and Donald were drinking at a local bar. When Donald and Jeri left the bar in a van, Stepdaughter and Donald's one-year-old son were with them. Jeri and Donald were talking and arguing.

On February 6, 1999, Jeri filled out and signed a Victim's Voluntary Statement Form (VVSF). In response to the question, "[h]ow you were physically hurt, harmed or abused," Jeri wrote that sometime after the argument broke out, Donald "hit me upside the [head], [threw] me out the car, [threw] me into shower & hit me, & push me down, & [choked] myself & ([Stepdaughter]). And also slapped me about 4 times." In response to the question, "[d]id you do anything to [Donald] before he/she hurt you," Jeri wrote, "yes." In response to the question, "[w]hat did you do," Jeri wrote, "I verbally was honest about sexuality."

At the trial, Donald testified that they left the bar and drove to a friend's house. Upon arrival, they sat in the van. In his words, "So we sat there for I'd probably say half an hour, 40 minutes, and Jeri stated, you know, talking about our sex life and everything and how she wasn't happy with it and all that and -- and anyways, it kept on, you know, we just kept on

talking about it[.]" Donald then exited the van and started walking home. When Donald "got about halfway to the next street . . . Jeri started yelling . . . you have the keys." Donald walked back, opened the door, Jeri exited the car and fell, her head hit the ground, and "she was out cold." In Donald's attempt to pick Jeri up, Jeri's shirt ripped and she fell back down. Donald got her back in the van, drove home, and carried Jeri to the gate. After he opened the gate, he carried her into the bathroom "[b]ecause she had blood coming out of the side of her head." While he was rubbing the blood off the top of Jeri's head, Stepdaughter "was running around the house screaming at the top of her lungs." He took the following action to quiet Stepdaughter: "I pushed her up against the wall, and the only way that I was able to quiet her down was to put my -- cup my hand over her mouth."

At trial, Jeri testified in relevant part as follows:

Q. Okay. What was that argument about?

A. I can't really remember cuz I had been drinking.

. . . .

Q. Okay. Did you get injured that evening?

A. Yeah.

Q. Okay.

A. I fell out of the car.

. . . .

Q. Do you remember talking to the police that evening?

A. A little bit.

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A. I was very hysterical, so I -- you know, I couldn't tell you who they were if they were to walk in the door. I don't know.

Q. Do you remember ending up in the shower that evening?

A. I remember waking up in the shower.

When asked about the VVSF, Jeri testified in relevant part as follows:

Q. You wrote it a little sloppy?

A. Yeah.

Q. Okay. And on question number 1 it says, were you physically hurt, harmed, or abused; and you answered yes. Is that correct?

A. Yes. I had thought that happened.

Q. Okay. Just one question at a time. And then it says, if yes, when did this occur; and you wrote February 6, 1999. Is that correct?

A. That's what it says, um-hmm.

Q. Okay. And you wrote that?

A. Approximately. I -- yeah, I guess. I mean, I -- the night, I don't remember writing this.

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Q.

And then on question 2 it says, describe how you were hurt, physically hurt, harmed, or abused. And you wrote, hit me up side the head, threw me out of the car, threw me into the shower and hit me, and pushed me down and choked myself and [Stepdaughter] and also slapped me about four times. That's what that says there, right?

A. Correct.

Q. And you wrote that.

A. I guess I did, I don't remember writing it, but I guess I did.

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A. Well, I don't know how I fell because I -- I blacked out or something. Cuz I remember waking up in the shower with water

hitting me in the face, and I totally freaked out cuz I didn't know what was happening.

Q. Then it says, did you do anything to [Donald] before he hurt you. And you said, yes.

A. Um-hmm.

Q. And then your answer to that was, I verbally was honest about sexuality. That's what you did to him before he hurt you.

A. I argued with him -- well, yeah.

Q. You argued about --

A. I started a fight with him, I guess.

. . . .

Q. Down at the bottom it says, this statement was written by me and is true and correct, and then you signed your name?

A. Yeah, I signed my name there, it looks like.

[DEPUTY PROSECUTING ATTORNEY]: Your Honor, at this time, the State's going to ask you to admit into evidence what's been previously marked as State's Exhibit 1 as State's Number 1.

THE COURT: [Defense Counsel]?

[DEFENSE COUNSEL]: No objection.

THE COURT: Court will receive into evidence State's Exhibit 1 as State's Number 1.

. . . .

Q. Okay. And on February 6th, 1999, you were arguing with him at that time.

A. Correct.

Q. And that's why he pulled you out of the van and you got hurt.

A. No, he did not pull me out of the van.

. . . .

Q. Okay. But you earlier stated that you just hit the back side of your head when you fell out of the van.

A. I wasn't even aware that I was bleeding until later when, I don't know if it was the neighbor or policeman or who it was said that there was blood in my hair.

On cross-examination, Jeri testified in relevant part as follows:

Q. Do you recall leaving [the bar]?

A. I recall getting ready to leave, and I actually don't remember leaving.

Q. Okay.

A. But like I -- you know, I remember certain things.

Q. Okay. What -- to what do you attribute that fact that you can only remember certain things?

A. Probably my drinking.

. . . .

Q. Okay. Upon leaving the restaurant, did you proceed to your friend's house at that point?

A. I think so.

Q. Okay. Do you recall?

A. I don't remember actually driving, but I remember [being] parked outside the house, yes.

Q. Okay.

A. I remember that part.

. . . .

Q. Okay. Do you recall the argument starting about sex, as you've stated here?

A. Very little.

Q. Okay. Do you remember any of that discussion?

A. No, not -- no, I actually really don't.

Q. Okay. When you got to the friend's house, how is it that you say you got hurt?

A. I fell out of the door.

Q. Okay. Do you recall falling out of the door?

A. I don't actually remember hitting my head or anything like that. I remember -- I remember falling out of the car, yeah, I do remember, like, falling.

. . . .

Q. . . . Do you recall where [Donald] was relative to the vehicle and you at the time that you fell out?

A. He was standing on the other side of the door.

Q. Okay. Is it your testimony today that he did anything to cause you to fall out?

A. No.

Q. Okay. To what do you attribute the fact that you fell out of the vehicle?

A. Probably that I was leaning on the door and just stumbled out.

Q. Okay. What, you -- you opened the door and just toppled over?

A. I don't know if I actually opened the door or if he opened the door.

. . . .

Q. Okay. After falling out of the van, what's the next thing you recall?

A. Water in my face. . . . And [Stepdaughter] screaming. . . . I just remember, like, chaos, screaming.

Q. Okay. And where was that, do you know where that was?

A. In my shower at our house.

. . . .

Q. Okay. And then what happened?

A. And then I remember -- I don't know what [Donald] was doing, but I remember he was doing something with [Stepdaughter], and I don't know if he was, like, getting her out or calming her down, I honestly don't know. Because she was screaming. And then I noticed that my clothes were off, my shirt had been torn. And then that's really -- and then I remember [Donald] left or something, and then I ran out the back door.

. . . .

Q. Okay. So are you able to say anything else that may have occurred between [Donald] and [Stepdaughter] at that point?

A. No, [because] it was just like a second, it seems like, now that I think back.

. . . .

Q. A little while ago you were shown the [VVSF]. Do you recall that?

A. Is that the paper that I wrote?

Q. Right.

. . . .

Q. Okay. Do you have a specific memory of filling out this document?

A. No. No, I don't. I don't remember that part at all.

Q. Okay. You recognize your handwriting.

A. Yeah.

Q. Okay. And you recognize your signature.

A. Yeah.

Q. But do you recognize anything else about the document at all?

A. I don't think that occurred. That's not what I feel.

Q. When you read through the statements on there, or when you read through them just a moment ago, is that the truth?

A. I don't think it is at all.

The trial court decided in relevant part as follows:

[W]hat I -- the court finds very interesting in this particular instance is the testimony from Officer Koyama. Officer Koyama was very clear that when he spoke to [Jeri], that when he talked to her, even though she was upset and she was crying a bit and she appeared to be a bit intoxicated -- cuz she had been drinking, he smelled alcohol and she had red eyes, and she admitted earlier that she'd been drinking beer and shooting tequila -- he said that she was very descriptive about what happened, that she had no difficulty understanding when he explained the form to her, that he explained the form to her, that he asked her if she had any questions regarding the form, asked her if she needed to have anything explained to her and if she had any questions to go ahead and ask him along the way.

. . . [Jeri] appeared to know what she was doing, [and] went ahead and filled out the form. Obviously, what's in Victim Voluntary Statement, State's Exhibit Number 1, differs totally, 180 degrees from the testimony that was given today in court. And the Court feels, after having an opportunity to look at the victim's voluntary form, which the Court does find is substantive evidence, based on all the factors that I have heard the Court

believes that the statements in the victim's voluntary form are truly what happened that night of February 6, 1999.

RELEVANT RULE OF EVIDENCE

Rule 802.1(1)(B), Hawai'i Rules of Evidence, Chapter 626, HRS (1993) (HRE Rule 802.1(1)(B)) states in relevant part:

The following statements previously made by witnesses who testify at the trial or hearing are not excluded by the hearsay rule:

(1) Inconsistent statement. The declarant is subject to cross-examination concerning the subject matter of the declarant's statement, the statement is inconsistent with the declarant's testimony, the statement is offered in compliance with rule 613(b), and the statement was:

. . . .

(B) Reduced to writing and signed or otherwise adopted or approved by the declarant.

POINT ON APPEAL

Donald's sole point on appeal is that the trial court committed plain error¹ when it admitted the VVSF into evidence because the VVSF was not subject to effective cross-examination as required by HRE Rule 802.1(1)(B), and the Sixth Amendment Right to Confrontation.

STANDARD OF REVIEW

Where the admissibility of evidence is determined by application of the hearsay rule, there can be only one correct result, and the appropriate standard for appellate review is the right/wrong standard. State v. Moore, 82 Hawai'i 202, 217, 921

¹ Hawai'i Rules of Penal Procedure Rule 52(b) states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

P.2d 122, 137 (1996) (citing Kealoha v. County of Hawai'i, 74 Haw. 308, 319, 844 P.2d 670, 675 (1993)).

DISCUSSION

"The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him [or her], and the right to conduct cross-examination." State v. Apilando, 79 Hawai'i 128, 131, 900 P.2d 135, 138 (1995) (citation omitted).

The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay. First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment *establishes a rule of necessity*. In the usual case . . . , *the prosecution must either produce, or demonstrate the unavailability of, the declarant*, whose statement it wishes to use against the defendant.

The second aspect operates once a witness is shown to be unavailable. Reflecting its underlying purpose to augment accuracy in the fact finding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances *only hearsay marked with such trustworthiness* that there is no material departure from the reason of the general rule.

Apilando, 79 Hawai'i at 132, 900 P.2d at 139 (1995), quoting Ohio v. Roberts, 448 U.S. 56, 65, 100 S.Ct. 2531, 2538 (1980)

(emphases added and internal citations and quotation marks omitted by the Hawai'i Supreme Court).

Unavailability may be demonstrated by a showing of a declarant's death, illness, infirmity, *age*, insanity, *loss of memory*, speech or sight, absence from the jurisdiction, and disappearance or an inability to secure the declarant's presence at trial due to official duty preventing his or her presence, or disqualification by infamy.

Apilando, 79 Hawai'i at 137-8, 900 P.2d at 144 (1995) (emphases in original and citations omitted).

It is the law that

[b]efore a prior inconsistent statement can be admitted as substantive evidence under HRE Rule 802.1(1)(B), the following foundational requirements must be met:

(1) a witness must testify about the subject matter of his or her prior statements so that the witness is subject to cross-examination concerning the subject matter of those prior statements; (2) the witness's prior statements must be inconsistent with his or her testimony; (3) the prior inconsistent statements must be reduced to writing and signed or otherwise adopted or approved by the witness; (4) the prior inconsistent statements must be offered in compliance with [Hawai'i Rules of Evidence] Rule 613(b), which requires that, on direct or cross-examination, the circumstances of the prior inconsistent statements have been brought to the attention of the witness, and the witness has been asked whether he or she made the prior inconsistent statements.

State v. Tomas, 84 Hawai'i 253, 258, 933 P.2d 90, 95 (App. 1997), quoting State v. Eastman, 81 Hawai'i 131, 137, 913 P.2d 57, 63 (1996).

There is a further requirement. In State v. Canady, 80 Hawai'i 469, 911 P.2d 104 (App. 1996), a police officer assisted the complaining witness in writing the answers to questions on the form known as the "Hawaii County Police Department Domestic Violence Case/Victim's Statement." At trial, the defendant objected to the written statement as inadmissible hearsay. The complaining witness identified her signature on the form but testified that she could not remember anything else about the form or the events described therein. In other words, the complaining witness was "unavailable" by reason of loss of memory. The issue pertained to "trustworthiness." This court concluded that the written statement was not admissible because the following requirement was not satisfied:

HRE 802.1(1) requires, as a guarantee of the trustworthiness of a prior inconsistent statement, that the witness be subject to cross-examination about the subject matter of the prior statement, that is, that the witness be capable of testifying substantively about the event, allowing the trier of fact to meaningfully compare the prior version of the event with the version recounted at trial before the statement would be admissible as substantive evidence of the matters stated therein.

Id. at 480-81, 911 P.2d at 115-16 (citations omitted).

Donald contends that "the record is clear that at trial the complaining-witness could not recall, and therefore could not meaningfully testify, about the substantive events that had been previously recorded in the Victim's Voluntary Statement."

The subject matter of the VVSF was as follows:

(1) Donald hitting Jeri on the head, (2) Donald throwing Jeri out of the car and pushing her down, (3) Donald throwing Jeri into the shower, hitting her and pushing her down, and (4) Donald choking Jeri.

According to Canady, the dispositive questions are whether Jeri was "subject to cross-examination concerning the subject matter of the prior statement" and "capable of testifying substantively about the event, allowing the trier of fact to meaningfully compare the prior version of the event with the version recounted at trial."

Obviously, there are situations where the witness does not remember everything about the event. According to Canady, the memory of the witness is sufficient when it allows "the trier of fact to meaningfully compare the prior version of the event with the version recounted at trial."

In light of the testimony quoted above, we conclude that the trial court did not commit plain error when it admitted the VVSF into evidence.

CONCLUSION

Accordingly, this court affirms the family court's April 8, 1999 Judgment of Probation.

DATED: Honolulu, Hawai'i, September 14, 2000.

On the briefs:

Jock M. Yamaguchi
for Defendant-Appellant.

Chief Judge

Simone C. Polak,
Deputy Prosecuting Attorney,
County of Maui,
for Plaintiff-Appellee.

Associate Judge

Associate Judge